# In the
# Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

*v.*

CHARLES F. WHITE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

## Brief of the Petitioner.

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## Table of Contents.

## Table of Authorities Cited.

CASES.

CONSTITUTIONAL AND STATUTORY PROVISIONS.



OTHER AUTHORITIES.



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### Opinions Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at Mass. Adv. Sh. (1977) 2805; 371 N.E. 2d 777 (1977) (A. 72).

## Jurisdiction.

The judgment of the court below was entered on December 30, 1977. The petition for writ of certiorari was filed on March 30, 1978, and was granted on May 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## Question Presented.

Whether statements held inadmissible at trial because the prosecution did not demonstrate a knowing and intelligent waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), must be automatically suppressed for all purposes?

## Constitutional Provision Invoked.

FIFTH AMENDMENT.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."



## Statement of the Case.

PRIOR PROCEEDINGS.

On May 20, 1976, Charles F. White, after a jury-waived trial, was found guilty (A. 2, 5, 8, 11) on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana, cocaine, amphetamines, and L.S.D. (A. 14-17), in violation of Mass. Gen. Laws c. 94C, § 31.

Prior to trial, the respondent filed a motion to suppress all oral or written statements taken from him following his arrest and all evidence seized from his automobile pursuant to a search warrant (A. 18).

After a pre-trial hearing on the motion to suppress (A. 22-54), a judge of the Superior Court of the Commonwealth issued *Findings and Rulings* (A. 59-68). The court concluded that the statement must be suppressed at trial because the Commonwealth had failed to demonstrate that the respondent had knowingly and intelligently waived his *Miranda* rights (A. 62-63), but held that the statement could be used to form the basis for a finding of probable cause for issuance of a search warrant and, therefore, the drugs and currency seized from the respondent's automobile, pursuant to that search warrant, were admissible (A. 68). The respondent filed an exception to the *Findings and Rulings* (A. 69).

On appeal, the Supreme Judicial Court reversed, holding that statements obtained in violation of the principles of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), could not be used to support issuance of a search warrant and that evidence obtained pursuant to that warrant must be suppressed. The court sustained the lower court's finding that the Commonwealth had not sustained the heavy burden placed upon it by *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966), to

demonstrate that the respondent had waived his privilege against self-incrimination and his right to retained or appointed counsel. *Commonwealth* v. *White*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2805 (A. 72).

## Statement of Facts.

The facts as elicited at the *Hearing on the Motion to Suppress* (A. 22-54) may be summarized as follows.

On March 28, 1975, at approximately 2 a.m., the chief of police of Ashfield, Massachusetts, was notified that an automobile accident had occurred. He proceeded to the scene and found a car which had gone over an embankment, hitting several poles. The respondent, who was seated in the car (A. 23, 60), asked the chief to help him, stating, "If you give me a push, I think I can make it" (A. 24). The chief, however, thought he (White) was under the influence of something. His eyes appeared glassy; his speech was somewhat slurred; and there was a strong odor of an alcoholic beverage (A. 24, 60). The chief then ordered him from the car, gave him his *Miranda* rights and told the respondent to follow him to his cruiser, which he did without assistance (A. 24, 60). The respondent expressed concern that the battery in his car might run down because the dome light was on (A. 31).

The chief then called the Massachusetts State Police for assistance. Trooper Taliaferro responded and was informed by the chief that the respondent "was under arrest for operating under the influence of alcohol" and a breathalyzer test was requested (A. 35, 60). The chief and the respondent then proceeded to the State Police barracks, followed by the trooper (A. 24-25, 60-61).



On arrival at the barracks, the respondent was again given his *Miranda* warnings, advised of his right to use a telephone and of his rights under Mass. Gen. Laws c. 90, § 24(1)(f) as to a breathalyzer test (A. 25, 32-33, 36, 61). The respondent replied to the effect that he would "lose my license either way" and agreed to take the test (A. 33, 61). He also attempted to call an attorney (A. 26, 31, 34, 36, 61).

There was further testimony that the respondent had some difficulty using the telephone and dropped some money on the floor in the process (A. 26, 37, 61);[1] but that he did succeed in completing two calls, one to an attorney who apparently declined to represent him (A. 26, 61). After approximately 40-50 minutes (A. 44, 61), a breathalyzer test was administered. The reading, .13, indicated that the respondent was under the influence of alcohol (A. 38, 45, 61).[2]

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the respondent in a cell (A. 50, 61). Before doing so he searched the respondent's person and found what appeared to be a marihuana cigarette in his shirt pocket. At that time the trooper told him (White) that he would also be charged with possession of marihuana, and he again read the *Miranda* warnings to him (A. 43, 61). The respondent replied that he saw nothing wrong in the possession of one marihuana cigarette (A. 27, 61). The officer then asked him if he had any other marihuana on his person or in

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[1]During the hearing on the motion to suppress, a tape recording of Trooper Taliaferro's testimony at the prior probable cause hearing was played into the record. At one point in this testimony the respondent is described as "starting to bounce off the walls" (A. 48). On recross-examination the trooper characterized his prior testimony as "overdramatized" and described the respondent as "scratching constantly"; as being driven "up the wall" as a result of the scratching (A. 51-52).

[2]Mass. Gen. Laws, c. 90, § 24(1)(e), provides, in pertinent part, that a reading of "ten one hundreths or more" creates a presumption that a person is under the influence of intoxicating liquor.

his car, and the respondent answered that he had more marihuana in his car. The respondent then stated that he could name some "biggies" (A. 40, 62), but Trooper Taliaferro told him that he did not want him to say anything further (A. 40, 62).

After the respondent was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application (A. 41, 62). The affidavit reads, in material part, as follows:

> "On March 28, 1975 I assisted Chief Walter Zalenski [*sic*] Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest." (A. 55-56, 62.)

A warrant for a search of the respondent's motor vehicle was issued on the basis of the application and the supporting affidavit (A. 57-58). Upon a search of the vehicle substantial quantities of various controlled substances plus $3,195 in cash were discovered in the vehicle's trunk (A. 58-59, 62).



## Summary of the Argument.

This case involves the admissibility of physical evidence seized pursuant to a search warrant which was obtained through use of a statement made to police by respondent while he was in custody, having been fully advised of his rights as prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court below subsequently held that the Commonwealth had not sustained the burden imposed by *Miranda* to demonstrate a knowing and intelligent waiver of the respondent's right to remain silent and right to counsel. The court held that the statement, taken in absence of proof of waiver, not only must be excluded from the prosecution's case in chief, but could not be used as a basis for probable cause for a search warrant, and therefore held that the real evidence seized should have been suppressed at trial.

The Commonwealth presents three distinct, but interrelated arguments in support of its contention that present federal standards do not require automatic exclusion for all purposes, of statements and of evidence obtained in violation of the principles of *Miranda*.

I. Recent decisions of this Court, such as *Harris* v. *New York*, 401 U.S. 222 (1971), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974), have denied *Miranda* co-equal status with the Fifth Amendment and have described *Miranda* requirements as merely "prophylactic safeguards" designed to protect fundamental constitutional privileges and guarantees. Therefore, if the alleged violation of *Miranda* does not violate the Fifth Amendment privilege against compulsory self-incrimination, the exclusionary rule explicit in that Amendment is not applicable. Similarly, if the alleged violation of *Miranda* does not involve a denial of a specific constitutional guarantee, such as the Sixth Amendment right to counsel, the judicially created

exclusionary rule, designed to provide for enforcement of *constitutional* rights, is not automatically implicated.

In the instant case, the violation was of the *Miranda* waiver requirement only and therefore need not trigger per se application of the exclusionary rule.

II. Even if the Commonwealth is wrong in its analysis of the constitutional underpinnings of *Miranda*, it does not follow that the *Miranda* exclusionary rule is absolute and all-pervasive. Such a result conflicts with the decisions of this Court in *Harris* v. *New York*, *supra*, and *Michigan* v. *Tucker*, *supra*.

In general, the Court has permitted use of illegally obtained evidence for certain purposes. *United States* v. *Calandra*, 414 U.S. 338 (1974).

The Commonwealth submits that this Court has adopted a flexible approach in determining the extent to which judicial sanctions will be imposed and that this approach requires examination of the nature of the violation, and the collateral purpose for which the "illegally" obtained statement is to be used. In the instant case, the statement was used to establish probable cause for issuance of a search warrant. In such a proceeding otherwise inadmissible evidence such as hearsay is traditionally permitted, if reliable. Since the statement here was not elicited through coercive police methods which would render it involuntary and unreliable, to prohibit its use to obtain real evidence, which is reliable in itself, would not further the public interest in having guilt or innocence determined on the basis of trustworthy evidence. Where there is no evidence of flagrant or intentional bad faith action on the part of the police, the deterrent purpose of the exclusionary rule would not be effectuated by exclusion of real evidence.

III. The Fourth Amendment exclusionary rule which requires suppression of fruits of a direct constitutional violation (e.g., *Wong Sun* v. *United States*, 371 U.S. 471 [1963]) is inapplicable. The violation in the instant case is of *Miranda* prophylactic procedural rules only. Moreover, even if *Wong Sun* is applicable, its applicability should be limited to those situations in which police conduct rendered the statement involuntary. The *Miranda* violation is but one factor to be considered in addition to other relevant factors described in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).



## Argument.

### The Automatic Exclusion of Statements Taken in Violation of Miranda v. Arizona, 384 U.S. 436 (1966), is Not Constitutionally Required.

#### A. *The Requirements of Miranda v. Arizona are Not Coextensive with the Fundamental Fifth Amendment Privilege Against Compelled Self-Incrimination.*

The precise constitutional issue addressed by the Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was the "admissibility of statements obtained from a defendant questioned while in custody." 384 U.S. at 445. In resolving this issue the Court articulated certain procedural safeguards which must be employed to protect the Fifth Amendment privilege against compelled testimony.

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise

those rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." 384 U.S. at 479.

The Court viewed these requirements as "fundamental with respect to the Fifth Amendment privilege" and as a prerequisite "to the admissibility of any statement made by a defendant." 384 U.S. at 476.

The factual premise for the majority's holding was a finding that police interrogation was so inherently coercive that, without the enumerated warning and waiver requirements, an individual's decision to speak could not be deemed to be free or voluntary.

> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458.[3]

Subsequent analysis by this Court of the constitutional status of the *Miranda* requirements has led to the conclusion that these "protective devices" do not have independent, immutable, constitutional status, but are merely judicially created regulations for implementing constitutional commands, rather than constitutional commands in themselves.

In *Harris* v. *New York*, 401 U.S. 222, 226 (1971), this Court referred to *Miranda* requirements as a "shield." In *Michigan*

[3]See also *id.* at 457, 467.



v. *Tucker*, 417 U.S. 433 (1974), the requirements were described as a "series of recommended 'procedural safeguards,'" *id.* at 443; as "only . . . the prophylactic standards . . . laid down by this Court in *Miranda* to safeguard that privilege [against self-incrimination]." *Id.* at 446.

In analyzing the *Miranda* decision this Court stated:

> "The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:
>
> > '[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' *Id.*, at 467.
>
> "The suggested safeguards were not intended to 'create a constitutional straightjacket,' *ibid.*, but rather to provide practical reinforcement for the right against compulsory self-incrimination." *Michigan* v. *Tucker*, 417 U.S. at 444.

It is the Commonwealth's position that, in reaching this view of the *Miranda* safeguards as not being of constitutional status, this Court has implicitly rejected the constitutional underpinnings of *Miranda*, and by so doing has obviated the justification for automatic application of the exclusionary rule in all instances in which violations of strict *Miranda* requirements have occurred.

The underlying premise of *Miranda*, that coercion (in the Fifth Amendment sense) is inherent in any custodial interrogation, was rejected by this Court in *Michigan* v. *Tucker*, *supra*.[4]

[4]See generally, *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 41, 199-202; Ritchie, L.J., *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 Minn. L. Rev. 383, 418 (1977).

The *Tucker* analysis focused solely upon historical Fifth Amendment considerations, rather than the "*ipse dixit*"[5] of the *Miranda* court.

> "A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*. Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed.
>
> . . . . . .
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> ". . . [H]is statements could hardly be termed involuntary as that term has been defined in the decisions of this Court.
>
> . . . . . .
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> "Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda*." *Michigan* v. *Tucker*, at 444-445.[6]

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[5] *Miranda* at 500 (separate opinion of Mr. Justice Clark).

[6] The Commonwealth recognizes that *Tucker* involved a pre-*Miranda* violation, but suggests that that fact does not militate against the view that the Court rejected the initial premise of *Miranda*, for that very premise was applied by the *Miranda* Court in viewing pre-*Miranda* custodial interrogations as inherently coercive.



To limit inquiry to historical considerations underlying the Fifth Amendment would be inconsistent with *Miranda*, which by its own terms went beyond the traditional concept of voluntariness, unless the Court was rejecting the "inherently coercive" premise.

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, at 457.

The court has continued its implicit rejection of the "inherently coercive" concept in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977), where this Court held that a statement made by a parolee who came to the police station, voluntarily, yet at the request of his parole officer, and was told that he was not under arrest, yet was told falsely that his fingerprints had been found at the scene of a burglary and who then confessed, prior to being given the *Miranda* warnings, was not in custody for *Miranda* purposes. The Court rejected the view that mere questioning at the station house constitutes a "coercive environment." *Mathiason*, at 495. This holding, the Commonwealth respectfully submits, differs substantially from the broad and darkly sinister picture of station house interrogation painted by the majority in *Miranda*.[7] Indeed, even without the formal announcement of arrest, Mathiason was subject to the same type of experience the *Miranda* decision sought to protect him against, i.e., the "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of con-

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[7] *Miranda*, at 445-458.

stitutional rights." *Miranda* at 445.[8] The Commonwealth submits, therefore, that this Court has rejected the premise that all police interrogation is inherently coercive.

Without such a premise the Fifth Amendment's direct command against compelled testimony would not operate to require automatic exclusion of statements obtained in violation of *Miranda* where those violations did not constitute an abridgement of the right against compulsory self-incrimination, but fell outside the realm of Fifth Amendment protection.

In further support of its position, the Commonwealth submits that this Court's recent decisions holding that statements taken in violation of *Miranda* may be admissible at trial for certain purposes, if they are found to be "otherwise trustworthy," demonstrate this Court's unwillingness to adopt a formalistic application of *Miranda*, and, in addition, constitute a rejection of the view that such violations necessarily implicate the Fifth Amendment.

In *Harris* v. *New York*, 401 U.S. 222 (1971), the statements of a defendant who had not been advised of his right to counsel were held admissible for impeachment purposes.

In *Oregon* v. *Hass*, 420 U.S. 714 (1975), the Court, holding that statements taken after a defendant had expressed a desire to speak with an attorney were admissible on rebuttal for impeachment purposes, stated:

> ". . . it does not follow from *Miranda* that evidence inadmissible against Hass in the prosecution's case in chief is barred for all purposes, always provided that 'the trustworthiness of the evidence satisfies legal standards.'

[8] See also, *Michigan* v. *Mosley*, 423 U.S. 96 (1975), holding that there is no per se proscription of indefinite duration against further questioning on any subject merely because a suspect indicates a desire to remain silent.



> [*Harris* v. *New York*,] 401 U.S., at 224." *Oregon* v. *Hass*, 420 U.S. at 722.

The Court in both cases noted the absence of evidence of coercion or involuntariness. *Harris* at 224; *Hass* at 722.

The implication of the above cases is that, contrary to *Miranda*, a confession or statement is not considered to be coerced in the Fifth Amendment sense merely because of failure to give the warnings or to observe them effectively. Rather, inquiry must be made as to voluntariness in the traditional sense. The Commonwealth submits that, had the court not abandoned the *Miranda* premise of "inherent coercion," the Court would not have allowed for a finding of "trustworthiness" and subsequent admissibility of the statements for other purposes. To do so without an implicit rejection of "inherent coercion" would be inconsistent with the well established principle that statements which are compelled in violation of the Fifth Amendment are per se inadmissible because they are in fact involuntary.

> "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego* v. *Twomey*, 404 U.S. 477, 485 (1972).

Inquiry as to trustworthiness or reliability is irrelevant to Fifth Amendment violations. *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961). If the statement is coerced, it is involuntary and therefore inadmissible by that reason alone. Hence, had this Court considered *Miranda* to be of parallel constitutional status with the Fifth Amendment, it would be inconsistent, at best, to hold that statements taken in violation of *Miranda* re-

quirements could be found to be "otherwise trustworthy" and thereby admissible in a judicial proceeding.

The Commonwealth respectfully suggests, therefore, that a violation of the *Miranda* requirements does not necessarily involve a violation of the specific constitutional guarantee against "compelled" testimony.

Since the exclusionary rule is a judicially created remedy for violations of *constitutional* rights, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), automatic application of that rule should only be mandated where the violation is of a constitutional right and not in an instance in which the violation involves only the prophylaxes of *Miranda*.

> "[I]n cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the *Miranda* prophylaxes, suppression is no longer automatic." *Brewer* v. *Williams*, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting).

The Commonwealth submits that, contrary to the Supreme Judicial Court's equation of *Miranda* violations with violations of constitutional guarantees (*Commonwealth* v. *White* at 2812; A. 78), this Court has distinguished between the two and now requires automatic suppression only where the disclosures are obtained as a result of compulsion which operates to deny a specific constitutional right. *Michigan* v. *Tucker*, at 444-445. Compare *Brewer* v. *Williams*, *supra* (deliberate effort by the police to override a defendant's asserted right to counsel by *psychological coercion*).

The court below found only that the prosecution had not sustained its heavy burden of demonstrating a knowing and intelligent waiver of counsel and of the right to remain silent.



The court below inferred that the police officer himself did not regard the respondent as having waived these rights. *Commonwealth* v. *White*, *supra*, at 2811 (A. 77).[9] However, such a determination does not support the legal conclusion that police conduct denied to the respondent his Sixth Amendment right to counsel.

With regard to the respondent's right to counsel, it should be noted that there was no interrogation concerning the initial charge, "driving under the influence." The respondent asserted his right to counsel for the purpose of arranging bail (A. 33, 44), and, arguably, for future representation at trial (A. 26, 37), and at no point was the defendant ever prevented from making telephone calls to an attorney (A. 51). The "interrogation" consisted of a single question relating to the narcotic charges. While the prosecution may not have demonstrated a "knowing and intelligent" waiver of counsel under *Miranda*, nothing in the conduct of the police supports a finding that the respondent's underlying constitutional right to counsel had been abridged. Compare, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Brewer* v. *Williams*, *supra*.

The Commonwealth submits that the violation in the instant case was of one of the *Miranda* prophylaxes only and, therefore, automatic suppression was not required.

### B. *Miranda v. Arizona, 384 U.S. 436 (1966), does Not Establish a Per Se Rule Requiring Exclusion of Evidence Obtained in Violation Thereof for All Purposes and in All Proceedings.*

The decision in *Miranda* v. *Arizona* was limited to the *admissibility* of statements in the prosecution's case in chief.

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[9] That the officer did not think that the respondent had waived his right in any absolute sense, but had merely made a voluntary response to a single inquiry concerning the new offense, is equally supportable.

*Miranda*, at 445. The Court did not address itself to what, if any, sanctions would be applied to the use of statements for collateral purposes,[10] nor did the Court specifically address the question of admissibility of real evidence obtained as a result of statements taken in violation of its safeguards.[11]

The Supreme Judicial Court, it is respectfully suggested, has, however, read *Miranda* to require automatic suppression for all purposes, except for impeachment. *Commonwealth* v. *Haas*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2212, 2236, 369 N.E. 2d 692 (concurring opinion). In *Haas*, the court ruled that statements elicited without warnings, as required by *Miranda*, may not be used to form the basis for probable cause for arrest. The arrest was therefore held to be invalid and subsequent statements and evidence seized pursuant to that invalid arrest were rendered inadmissible. The concurring opinion makes clear that the court based its decision on what it considered binding decisions of this Court which automatically required suppression, even though "[t]he defendant's statements, which we are required to suppress, were voluntarily made, and they bore significant indicia of reliability." *Haas*, at 2236.

Suppression was, under the court's interpretation of federal standards, compelled, even though,

> "the police officers acted in good faith, attempting to observe proper legal standards. Their violation of those standards was not gross or wilful, was not of a kind likely to mislead the defendant, and did not create a significant risk that his statement . . . [was] untrue." *Haas*, at 2237.

[10]The Commonwealth suggests that the language of the Court: "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him" (384 U.S. at 479), is unnecessary to the Court's decision and is dictum only. See, *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

[11]The issue was raised on *Orozco* v. *Texas*, 394 U.S. 324 (1969), but was not reached.



In the instant case, the court continued its per se approach to prohibit automatically the use of statements taken in violation of *Miranda* waiver requirements for the purpose of securing a search warrant, stating,

> ". . . neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would, in effect, sanction the initial violations of constitutional guaranties which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called 'fruit of the poisonous tree' doctrine . . .." *Commonwealth* v. *White*, at 2812-2813 (A. 78).[12]

This broad interpretation of the judicial sanctions imposed by *Miranda* is inconsistent with the rulings of this Court permitting use of such statements at trial, although not permitting their use in the case in chief. Here the statement was utilized in a proceeding collateral to the trial, i.e., in obtaining a search warrant.

In *Harris* v. *New York*, *supra*, this Court held that statements made by a defendant in custody without being advised of his right to appointed counsel could be used to impeach the defendant's credibility should he testify at trial. The Court stated:

[12]The court apparently assumed without analysis that a violation of *Miranda* requirements was necessarily a violation of a constitutional right. As will be discussed, the Commonwealth suggests that violation of *Miranda* rules regarding waiver does not amount to a violation of constitutional guarantees and therefore the "fruit of the poisonous tree" doctrine is inapplicable.

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

The Court noted that there was no suggestion "that the statements made to police were coerced or involuntary." *Id.* at 224.

Under these circumstances, the Court then balanced the deterrent effect of exclusion against society's interest in a full and fair hearing, stating:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

Again, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the defendant had been given incomplete *Miranda* warnings; his statements led police to a third party witness who testified at trial. The Court held that use of this testimony was not a forbidden derivative use of the defendant's initial statements, and, in so doing, explicitly distinguished between a *Miranda* violation and a violation of the constitutional privilege against self-incrimination.[13] *Michigan* v. *Tucker*, at 444.

[13]The court below did not acknowledge this distinction. *White*, at 2812-2813 (A. 78-79). Moreover, in *Michigan* v. *Tucker*, this Court also rejected the notion that the imperative of "judicial integrity" provides an independent basis for excluding derivative evidence. The court below apparently invoked this concept as a basis for its decision. *White*, at 2812 (A. 78).



The Court, noting that the interrogation involved "no compulsion sufficient to breach the right against seif-incrimination" (*id.* at 445), held that the interests of justice in a full hearing on the basis of all trustworthy evidence outweighed the value of a deterrent effect, if any, in the exclusion of such evidence.

This Court has repeatedly rejected a per se application of the exclusionary rule. In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court held that evidence seized in violation of the Fourth Amendment, though inadmissible at trial, could be used in grand jury proceedings. Similarly, the Court has declined to extend the exclusionary rule to hold inadmissible in a federal civil tax proceeding evidence obtained by a state law enforcement officer pursuant to a search warrant later proved to be defective. *United States* v. *Janis*, 428 U.S. 433 (1976). Most recently, this Court has held admissible living witness testimony which was the fruit of an illegal search. *United States* v. *Ceccolini*, ____ U.S. ____, 22 Cr. L. 3510 (1978). In general, the Court has declared:

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

The thrust of these cases, it is submitted, constitutes an obvious rejection of a per se, inflexible application of the exclusionary rule to proscribe use of illegally seized evidence for all

purposes in all proceedings. The inflexible application of the exclusionary rule utilized by the court below is simply not required under federal standards.

Consistent with *Michigan* v. *Tucker*, a determination to apply the exclusionary rule should take into account the nature of the violation, the nature of the proceeding in which the statement is sought to be used, and the effect of applying the exclusionary rule, balanced against the interests of justice and society in having guilt or innocence determined on the basis of trustworthy evidence.

1. Nature of the Violation.

In the instant case, the respondent was read his rights on three occasions, the last warning immediately preceding his unsolicited statement that he did not think possession of a single marihuana cigarette was a crime (A. 67). The only interrogation was a casual response to his voluntary statement, consisting of a single question, "Do you have any more?" (A. 27, 40). When the respondent answered that he had more in his car and offered to name some "biggies," all inquiry ceased (A. 67). The trial judge found: "In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*" (A. 67). There is nothing in the record to indicate any deliberate police misconduct, or any dishonesty of purpose or effort to coerce or cajole the respondent. Compare, *Brewer* v. *Williams*, 430 U.S. 387 (1977).

The single factor which the court below found to violate *Miranda* was that the respondent's waiver was not "knowingly and intelligently" made (A. 62-63). The facts underlying this finding do not support a finding of involuntariness, nor did the trial judge so find.[14]

[14]It is open to this Court on the question of waiver, as a matter of federal constitutional law, to apply constitutional principles to the facts as found by the state court. See *Brown* v. *Allen*, 344 U.S. 443, 507 (1953) (separate opinion); *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977).



Under Mass. Gen. Laws c. 90, § 24(1)(e), a .13 reading creates merely a statutory (rebuttable) presumption that an individual is "under the influence" of intoxicating liquor for the purpose of driving: a condition short of intoxication. *Commonwealth* v. *Lyseth*, 250 Mass. 555 (1925).

Evidence that the respondent was "under the influence" to a degree which might affect his ability to waive intelligently his rights does not lead necessarily to the conclusion that his statements were involuntary.[15] Comparison of the facts in this case with *Commonwealth* v. *Hosey*, 368 Mass. 571 (1971), is instructive. Hosey was arrested for drunkenness and then subjected to interrogation for over an hour and a half in connection with a sexual assault on a child; he was described as "extremely emotional," "extremely high," "abnormal" and "detached from reality." *Hosey*, at 575, 579. Although given his *Miranda* warnings, ". . . the police gratuitously indicated to the defendant that it would be difficult to get a lawyer at that hour [approximately 5:00 a.m.] though his right could be exercised 'if he insisted.'" *Hosey*, at 577-578. The condition of defendant Hosey requiring the subsequent finding of "no knowing and intelligent waiver" was later described as ". . . the breakdown of cognition and volition [which] was evident and very serious" in *Commonwealth* v. *Fielding*, ____ Mass. ____, Mass. Adv. Sh. (1976) 2290, 2310, n. 23.

No such extreme disorientation is present in the instant case, nor was the respondent subjected to "interrogation" beyond a

[15]Compare, *Robinson* v. *State*, 208 Tenn. 521, 347 S.W. 2d 41 (1961) (defendant with a .23 reading capable of a voluntary statement); *State* v. *Beasely*, 10 N.C. App. 663, 179 S.E. 2d 820 (1971) (.14 reading did not render statement involuntary); *Ritter* v. *State*, 3 Tenn. Cr. 372, 462 S.W. 2d 247 (1970) (.135 reading did not render statement involuntary).

single question, nor did the police make any deliberate attempt to prevent consultation with counsel.

The Commonwealth submits that nothing in the record indicates involuntariness in the Fifth Amendment sense. Under these circumstances the alleged violation is of *Miranda* waiver requirements only. Indeed, the Supreme Judicial Court indicated that something less than constitutionally prohibited conduct had occurred, when it stated: ". . . the more *prudent* and constitutionally preferable course would have been for the police to withhold any further questioning 'until [the defendant] was clearly capable of responding intelligently.'" *White*, at 2811 (A. 77) (emphasis added). This statement indicates that the Court viewed the police conduct as violating not a constitutional rule, but merely the prophylactic waiver requirement of *Miranda*.

2. Nature of the Collateral Proceeding.

The statement in question was used as a basis for probable cause for the issuance of a search warrant (A. 55-56). Evidence, although inadmissible at trial because it is hearsay, has traditionally been an appropriate basis for determining probable cause for a search warrant. The constitutional limitation on the use of such evidence is that it be reliable. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969). As *Tucker*, *Hass*, and *Harris* make clear, a violation of *Miranda* does not result in unreliability absent a showing of coercion. Provided all other constitutional standards are met, the reliability or truth of the statement in question may be quickly verified. The evidence or contraband will be discovered pursuant to the warrant, or not. If it is discovered, the statement obviously was reliable.



If the evidence is not discovered, the defendant will not in any way be disadvantaged by the use of his statement for this purpose.

Moreover, the use of the statement in question to establish probable cause for issuance of a search warrant is analogous to the use of a consent under certain circumstances to validate a warrantless search. A consent to search given after a suspect is placed under arrest and is in custody, but has not yet been given *Miranda* warnings, has been held to be valid and admissible on a motion to suppress in order to validate the search. *United States* v. *Hall*, 565 F. 2d 917 (5th Cir. 1978); *United States* v. *Lemon*, 550 F. 2d 467 (9th Cir. 1977); *United States* v. *Horton*, 488 F. 2d 374 (5th Cir. 1973); *State* v. *Wallace*, ____ S.C. ____, 238 S.E. 2d 675 (1977).

In the instant case, the statement was used to satisfy Fourth Amendment requirements of probable cause only. The Commonwealth submits that no logical distinction can be drawn between the use of consent, where the defendant is in custody and not warned of his *Miranda* rights, to satisfy Fourth Amendment requirements, and the use of the respondent's statement here to satisfy the Fourth Amendment requirement of probable cause. The fact that the statements are later held to be inadmissible at trial for lack of an intelligent waiver (the only sanction specifically required by *Miranda*) should not affect their use as a basis for a determination that probable cause exists for the issuance of a search warrant.

3. The Effect of Application of the Exclusionary Rule.

The purpose underlying application of the exclusionary rule is to deter future police misconduct.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in

willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, *supra*, at 447.

In the case at bar there is no evidence of wilful or deliberate police misconduct. In fact, the trial judge found:

> "In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*." (A. 67.)

The respondent was read the warnings on three occasions. He was free to use the telephone and did so. There is no evidence of any extended interrogation; in fact, there was only a single question put to the respondent after he was charged and warned on the new offense. It is difficult, if not impossible, the Commonwealth suggests, to articulate a positive deterrent rationale for exclusion of the statement for the purpose of securing a search warrant.[16] The discussion of the issue in *Hass*, *supra*, is instructive:

> "The deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings.
>
> . . . . . .
>
> "One might concede that when proper *Miranda* warnings have been given, and the officer then continues his

[16]The Commonwealth submits that the effect could indeed be negative, suggesting to police officers that, rather than proceed in a proper manner and secure a search warrant, they merely wait until the automobile is secured at the police station and then conduct an inventory of its contents.



> interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris*, and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Hass*, *supra*, 420 U.S. at 723.

That the officer was unaware of any defect in the procedure by which the respondent's statement was elicited and was acting in good faith is evidenced by his offer of the statement in his affidavit in support of the application for a search warrant (A. 56).

Given only a speculative possibility that exclusion of the real evidence seized pursuant to an otherwise valid warrant would provide a positive deterrent effect on future police conduct, the Commonwealth suggests that the interest of the public and the interests of justice in having a defendant's guilt or innocence determined on the basis of trustworthy evidence compels a result contrary to that reached by the Supreme Judicial Court. *Michigan* v. *Tucker*, *supra*. The Supreme Judicial Court's automatic, per se application of the exclusionary rule is simply not compelled by federal standards and is inconsistent with this Court's efforts to balance the conflicting interests involved before applying the rule. Within the Fourth Amendment context this Court has recognized that the policies behind the exclusionary rule are not absolute. *Stone* v. *Powell*, 428 U.S. 465 (1976).

"I tend generally to share the view that the *per se* application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. . . ." *Brewer* v. *Williams*, 430 U.S. 387, 413-414, n. 2 (1977) (concurring opinion of Mr. Justice Powell).

The Commonwealth would urge the Court to apply the same flexible approach to application of the exclusionary rule to a case falling solely within the context of *Miranda* v. *Arizona*, where police conduct is neither "flagrant" nor coercive.

### C. *The "Fruit of the Poisonous Tree" Doctrine does Not Require Exclusion of the Evidence Seized from the Respondent's Motor Vehicle.*

The court below held that the evidence obtained from the defendant's automobile must be excluded under the "fruit of the poisonous tree" doctrine. The court followed its previous decision in *Commonwealth* v. *Haas, supra*, in which it was held that statements taken in violation of *Miranda* v. *Arizona* could not be considered in determining probable cause for arrest and that subsequent statements and items seized must be suppressed under *Wong Sun* v. *United States*, 371 U.S. 471 (1963).



The Commonwealth submits that this Court, however, has never applied the *Wong Sun* doctrine to *Miranda* violations, although the Court has indicated that in a "proper" case the doctrine might have applicability. *Michigan* v. *Tucker*, at 447. The Commonwealth submits that the "proper" case, unlike the instant case, would be one involving coercion or bad faith conduct on the part of police officers.

The Commonwealth further submits that the "fruit of the poisonous tree" doctrine does not apply unless the initial illegality is of constitutional dimension and, further, that the deterrent purpose of the exclusionary rule in general would not be furthered by such application.

*Wong Sun* prohibited use of evidence derived from an illegal arrest and search which violated Fourth Amendment rights. Thus, the "primary illegality" which triggered application of the prohibition against use of derivative evidence involved a constitutional violation.

However, in *Michigan* v. *Tucker*, the Court expressly rejected an equivalence between *Miranda* violations and constitutional violations. 417 U.S. at 444-445. The Court, although finding that *Miranda* had been violated, did not apply the *Wong Sun* doctrine, stating:

> "This Court has also said, in *Wong Sun* v. *United States*, . . . that the 'fruits' of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid

down by this Court in *Miranda* to safeguard that privilege." *Michigan* v. *Tucker*, at 445-446.

The clear implication of *Tucker* is that the "fruit of the poisonous tree" doctrine would not be triggered unless that primary illegality involved an invasion of a specific *constitutional* guarantee and that a mere *Miranda* violation does not reach such a constitutional dimension.[17]

The "fruits" doctrine has been held by several lower courts to be inapplicable to *Miranda* violations in the absence of involuntariness. *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976);[18] *Simmons* v. *Clemente*, 552 F. 2d 65 (2d Cir. 1977). See *Bertram* v. *State*, 33 Md. App. 115, 364 A. 2d 1119 (1976), and cases cited therein;[19] *Rhodes* v. *State*, 91 Nev. 17, 530 P. 2d 1199 (1975).[20]

[17]This interpretation is consistent with *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, the initial coercion arose from an arrest without probable cause in direct contravention of a constitutional guarantee. The Court merely held that the subsequent giving of *Miranda* warnings could not dissipate that taint.

[18]The Ninth Circuit, in *United States* v. *Lemon*, *supra*, 550 F. 2d at 472, did not resolve the issue, for the court held that a statement eliciting a consent to search did not implicate a Fifth Amendment right and therefore *Miranda* was inapplicable. The court, noting that *Miranda* warnings are not constitutional rights in themselves, did, however, hold that statements elicited prior to *Miranda* warnings could be introduced at a pre-trial suppression hearing to establish the validity of a search. But see *Tremayne* v. *Nelson*, 537 F. 2d 359 (9th Cir. 1976). See also *Null* v. *Wainwright*, 508 F. 2d 340 (5th Cir. 1975), cert. denied, 421 U.S. 970 (1975).

[19]In *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975), the court acknowledged the distinction, but found a fundamental violation of the constitutional right against self-incrimination. It is important to note that the court also found the initial illegal detention to be "patently flagrant." 29 Md. App. at 145, 349 A. 2d at 442.

[20]In a pre-*Tucker* case, *Keister* v. *Cox*, 307 F. Supp. 1173 (W.D. Va. 1969), a federal district court indicated its view that the Fifth Amendment as



The Commonwealth submits that the only justification for extension of the *Wong Sun* doctrine to situations involving the Fifth Amendment flows from a determination that the initial statement leading to derivative real evidence was involuntary as a result of compulsion or intentional bad faith conduct on the part of police which could be deemed to have "overborne the will" of the accused. In the instant case, no such finding of involuntariness has been made, nor would the facts support such a finding under the "totality of the circumstances" test. In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court outlined the factors to be considered in determining voluntariness:

> ". . . the youth of the accused, *e.g.*, *Haley* v. *Ohio*, 332 U.S. 596; his lack of education, *e.g.*, *Payne* v. *Arkansas*, 356 U.S. 560; or his low intelligence, *e.g.*, *Fikes* v. *Alabama*, 352 U.S. 191; the lack of any advice to the accused of his constitutional rights, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737; the length of detention, *e.g.*, *Chambers* v. *Florida*, *supra*; the repeated and prolonged nature of the questioning, *e.g.*, *Ashcraft* v. *Tennessee*, 322 U.S. 143; and the use of physical punishment such as

construed by *Miranda* did not necessarily operate to exclude physical evidence discovered as a result of disclosures made in violation of *Miranda*. The court, while apparently of the view that *Miranda* requirements were of parallel, co-equal status with the Fifth Amendment, distinguished between the Fifth Amendment bar as to compelled "testimony" and "real" evidence obtained through compulsion, citing *Schmerber* v. *California*, 384 U.S. 757, 764 (1966):

> "Under *Schmerber* and *Killough* then, the gun is not necessarily made inadmissible by the mere fact that Keister showed the office[r] its whereabouts having not been first given the requisite warning under *Miranda*. The Commonwealth will have to identify the gun other than by *statements* made by the accused while in custody as a result of police interrogation." 307 F. Supp. at 1176.

the deprivation of food or sleep, *e.g.*, *Reck* v. *Pate*, 367 U.S. 433." 412 U.S. at 226.

See generally *Miranda* v. *Arizona*, *supra*, at 508 (Harlan, J., dissenting).

Argument on sentencing revealed that the respondent was a student at the University of Massachusetts.[21] He was advised of his constitutional rights on three occasions, the last being immediately prior to the statements in question. He was in custody at the State Police barracks for less than one hour. Interrogation was neither prolonged nor repeated. The interrogation, if it may be so deemed, consisted of one question posed by the officer in response to an unsolicited statement by the respondent. There is, moreover, absolutely no evidence of bad faith or coercion. Indeed, the only evidence supporting the finding of no intelligent waiver is that the respondent voluntarily ingested sufficient alcohol to raise the statutory presumption that he was under the influence of alcohol, and that his motor responses were impaired, in that he was "dropping coins" and "bouncing around."

The Commonwealth suggests that application of the exclusionary rule to require suppression of otherwise reliable and probative evidence discovered under circumstances free of coercive or bad faith conduct serves neither to effectuate the purpose of the exclusionary rule nor to best serve the interests of justice.

The primary purpose of the exclusionary rule is to deter future police misconduct.

> "'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional

[21] Transcript, *Commonwealth* v. *White*, at 71.



> guaranty in the only effectively available way — by removing the incentive to disregard it.'" *United States* v. *Calandra*, 414 U.S. 338, 347 (1974), quoting *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

In order to effectuate this purpose logically some intentional, bad faith conduct must be involved. *Oregon* v. *Hass*, *supra*. No such showing has been made.

The real evidence under attack in the instant case, as opposed to compelled testimony, carries its own indicia of reliability. Therefore, the alternative justification for application of the exclusionary rule — to protect "the courts from reliance on untrustworthy evidence" (*Michigan* v. *Tucker*, at 448) — is also inapplicable.

The rationale of *Michigan* v. *Tucker* is applicable to the instant case. The court below has erred in attributing immutable, independent constitutional status to the *Miranda* safeguards in direct conflict with this Court's directives. The Supreme Judicial Court, the Commonwealth respectfully submits, has read too broadly the exclusionary requirements of *Miranda* v. *Arizona* as requiring per se exclusion for all purposes of statements taken in violation of its prophylactic standards.

## Conclusion.

For the reasons stated above, the Commonwealth respectfully requests that the judgment of the Supreme Judicial Court be reversed.

Respectfully submitted,

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